84831-9

No. 84831-9

SUPREME COURT
OF THE STATE OF WASHINGTON

JZ Knight,

Petitioner,

v.

City of Yelm and TTPH 3-8, LLC,

Respondents.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Petitioner JZ Knight, leader of the Ramtha School of Enlightenment, owns a large estate outside the City of Yelm (City). Knight opposed applications for preliminary approvals of proposed residential subdivisions in the City before the Hearing Examiner and the City Council and brought LUPA actions challenging the City's approvals. Knight's sole stated concern has been the City's ability to serve the proposed developments with water. She has contended that the requirement of "appropriate provision for...potable water supplies" for **preliminary** plat approval[1] can be met only if it is conditioned on proof, prior to future **final** plat approvals, of sufficient water rights to serve the proposed plat along with all other approved but unbuilt development.

The Hearing Examiner[2] and lower court[3] both decided that they lacked jurisdiction to decide, in the context of applications for **preliminary** plat approval, what is required for potential future applications for **final** plat approval. Knight conceded to the Court of Appeals that the issue of whether adequate water supply at **final** plat approval must be determined

[1] RCW 58.17.110
[2] CP 392-396.
[3] CP 1636-1642.

by proof of City-owned water rights was not ripe for adjudication and was, not an issue before the Court of Appeals.[4]

As a result, Knight's sole basis for challenging the preliminary plat approvals was limited to language used by the Hearing examiner in a condition to the **preliminary** approvals—that determinations of "a potable water supply adequate to serve the development at **final** plat approval **and/or** prior to the issuance of any **building permit**"(Condition).[5]. Knight's argument that the "and/or" conjunction allowed the City to forego a determination of water availability at **final** plat approval and defer the determination until building permit approval is without basis in fact or law. In Finding 2 accompanying the disputed condition, the Examiner explicitly recognized that determinations of available water supply were required prior to **both** final plat and building permit approvals:

> [w]hile State law and the Yelm Municipal Code require potable water supplies at final plat approval **and** building permit approval, the Examiner has added a condition requiring such.[6]

In light of Finding 2, the meaning of the Condition was clear. However, the language of the Condition is immaterial because all parties agree that State law requires determinations of available water at **both** final plat and building permit approvals. If the condition were inconsistent with this

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[4] Resp.Br.at 3.
[5] CP 394 (emphasis added).
[6] CP 392-396, H.E. Decision on Reconsideration at 2, (emphasis added).

absolute legal requirement, it would be invalid and without effect.

Moreover, throughout this litigation, the City, while arguing the immateriality of the disputed Condition's language, has agreed to clarification of the language merely to terminate needless argument about a nonissue. Knight apparently has contrived this asserted issue as a pretext to challenge the preliminary plat approvals. The effect of the language of the Condition is not an issue and never has been an issue. State law requires determinations of water availability at final plat approval, RCW 58.17.150, and building permit approval, RCW 19.27.097, regardless of any such condition, as the Court of Appeals acknowledged.[7]

Since there was no issue regarding how water availability must be determined before the Court of Appeals, the Court decided only that Knight lacked standing to challenge the preliminary plats and that the City and Tahoma Terra were entitled to recover attorney fees under RCW 4.84.370 because the City's preliminary plat approvals were upheld by the superior court and the Court of Appeals. Knight's Petition for Review (PFR) is limited to these two issues. The Court's Decision on these two issues properly applied well-established standing law and the plain statutory language of RCW 4.84.370.

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[7] Unpublished Court of Appeals Decision terminating review in *JZ Knight v. TTPH 3-8, LLC,* filed April 13, 2010 (Decision or Unpublished Decision), p. 12.

Review by the Supreme Court is not warranted under RAP 13.4(b)(1)-(4). The Decision is not in conflict with any decision of the Supreme Court or the Court of Appeals and does not involve any question of constitutional law or any issue of substantial public interest. This is a "garden-variety" land use dispute where issues of standing and attorney fees were properly decided by the Court of Appeals.

Throughout this litigation, Knight's briefing has been riddled with incorrect and misleading statements about the City's water system management practices and the parties' arguments and positions on the issues. Major portions of the City's briefs and many attorney hours have been devoted to correcting Knight's misstatements.[8] Even after Knight explicitly recognized that water rights and water system management were not issues in this case, her briefing, including her PFR, continue the unfounded attacks. *PFR*, pp. 2,3,4,6,8,9,10,11,13,16,18. While not relevant to the issues in this case, there is extensive evidence in the administrative record of the City's exemplary record of water system planning and management. [9]

II. IDENTITY OF RESPONDENT

[8] *See* Reply Brief of Appellant City of Yelm (App. City's Reply Br.), 4-7, 7-8, 9, 10-12, 13.

[9] E.g., CP111 at 1289-1491; CP111 at 1267-75; *See also* App.City's Reply Br, pp. 4-7.

This Answer to Petition for Review is filed by the City of Yelm, a Respondent in the Petition for Review filed by Petitioner JZ Knight.

III. COURT OF APPEALS DECISION

The Unpublished Court of Appeals Decision terminating review in *JZ Knight v. TTPH 3-8, LLC,* filed April 13, 2010, and Order Denying Motion for Reconsideration, dated June 17, 2010.

IV. STATEMENT OF THE CASE

On July 23, 2007, Hearing Examiner Stephen Causseaux held a public hearing on the five proposed preliminary plat and binding site plan approvals at issue in this case: Tahoma Terra, Windshadow PRD, Windshadow Townhomes, Wyndstone, and Berry Valley I. CP30 at 68-121; CP34 at 137-189; AR: H.E. Decisions dated 10/9/07 &12/7/07.[10] After reviewing extensive post-hearing submissions, the Examiner conditionally granted preliminary approvals in five decisions issued on October 9, 2007. *Id.* The decisions are essentially the same in relation to the issues before the Court.

Knight filed a motion for reconsideration of the Examiner's decisions. CP34. The Examiner issued his Decision on Reconsideration on December 7, 2007, adding three findings and a new condition to his previous decisions on the five preliminary subdivision approvals. CP111..

[10] The five applications are referred to jointly herein as the subdivision applications.

Finding 2 is important to the issues in this case:

> 2. While State law and the Yelm Municipal Code require potable water supplies at final plat approval and building permit approval, the Examiner has added a condition of approval requiring such. However, the balance of the conditions of approval requested by Mr. Moxon in his response are beyond the Examiner's authority and interfere with the City's ability to manage his [sic] public water system. Furthermore, the proposed conditions require actions by the City beyond the control of the applicant and are therefore not proper as the applicant cannot require the City to take such actions. These conditions would prohibit the applicant from getting final approval of its project even if it had satisfied all requirements for final plat approval.

CP111, Decision on Reconsideration at 2. In addition, the Examiner added the following Condition to each of the five preliminary approvals:

> The applicant must provide a potable water supply adequate to serve the development at final plat approval and/or prior to the issuance of any building permit except as model homes as set forth in Section 16.04.150 YMC.

Knight appealed the Examiner's preliminary approvals to the City Council. After dismissing Knight's appeal for lack of standing under the City Code, the Council contingently reviewed the issues raised by Knight and upheld the Examiner's approvals. AR: City of Yelm Res. 481 (Feb. 12, 2008). Knight appealed the City's decisions to Thurston County Superior Court under the Land Use Petition Act, RCW Ch. 36.70C (LUPA). In April, 2008, the City filed a Motion to Dismiss Knight's Petition on the ground that she failed to appeal the Council's dispositive

decision that she lacked standing to appeal the Examiner's decisions to the Council because she had not shown that she was an "aggrieved person," as required by the City Code. CP43. The City also joined in a motion filed by other respondents seeking dismissal of the LUPA petition on the grounds that Knight lacked standing both to appeal the Examiner's decision to the Council and to obtain judicial review under LUPA. CP44; CP27; CP32. The trial court denied the motions to dismiss without prejudice to a subsequent motion for summary judgment. CP77.

Subsequently, the City joined a motion for summary judgment on grounds of lack of standing under the City Code and LUPA. CP70; CP71. The City joined in this motion. CP91. The motion was denied. CP100.

The court held the LUPA hearing on October 1, 2008 and issued a letter decision on October 7, 2008. CP121. Knight submitted a proposed judgment, findings of fact, and conclusions of law. CP128. The City and other respondents filed objections. CP131, 132, 137. The trial court entered Knight's proposed judgment, findings and conclusions, with minor revisions. CP139; CP140.

The City adopts the more detailed Statement of the Case in the Answer Of TTPH 3-8,LLC ("Tahoma Terra"). To Petition For Review.

V. ARGUMENT: REASONS WHY REVIEW SHOULD NOT BE ACCEPTED

A. The Court of Appeals' Unpublished Decision on the Standing Issue Does Not Warrant Review by the Supreme Court.

1. The Court of Appeals' Decision on Standing Was Based on Well-Established Rules of Standing Law.

The Decision on standing applied well-established standing law to the facts of this case. *Decision, pp. 10-13.* Knight's sole basis for asserting standing was her ownership of senior water rights in groundwater and Thompson Creek *Resp. Br.* at 9. She claims that withdrawal of water to serve the proposed developments, along with previously approved development, would jeopardize her water rights. *Resp. Br.* at 26-27.

The Court recognized, as the parties agreed, that the standing requirements of YMC 2.26.150, for appealing the hearing examiner's decision to the City Council and LUPA, RCW 36.70C.070, are essentially the same. Under both, Knight was required to show "injury-in-fact" as a result of the preliminary plat approvals. *Decision, p.11.* Since she asserted standing on the basis of threatened, rather than actual, injuries, she had to show "an immediate, concrete, and specific injury to herself." *Id.* Conjectural, hypothetical, or imagined injury is not sufficient. *Id.*

The Court recognized that injury-in-fact to her senior water rights could occur only under a highly unlikely and speculative combination of circumstances: (1) there would, in fact, be insufficient water to serve the new development without impairing Knight's water rights; (2) future final

plat approvals would be erroneously granted despite insufficient water; (3) subsequent building permits would be erroneously granted despite insufficient water; (4) such erroneous future approvals would not be overturned in LUPA actions; (5) the State Department of Ecology (Ecology) would erroneously transfer water rights without conditions to protect Knight's senior water rights; and (6) Ecology would not take enforcement action to protect Knight's senior water rights from excessive withdrawals under junior water rights. The Court correctly concluded that such possible but highly unlikely future injuries to Knight's water rights do not meet standing requirements because they are not immediate, concrete, and specific, but merely conjectural.

Knight does not even argue that her water rights would suffer specific, concrete, immediate injury. Instead, she cites Washington court decisions holding that neighboring property owners have standing to challenge land use decisions on adjacent development proposals. *PFR,* p.12. However, the cases cited involved specific traffic and stormwater impacts that would be immediate, concrete, specific injuries. In contrast, the only injury asserted by Knight is impairment of her senior water rights which could occur only as a result of a highly unlikely series of events over an extended period of time. Such speculative, conjectural, potential future injuries are not sufficient to establish standing. *E.g., Trepanier v.*

Everett, 64 Wn.App.380,383, 824 P.2d524 (1992).

2. Knight's Standing Argument, If Judicially Adopted, Would Immensely Expand the Scope of Standing Beyond Washington State and Federal Standing Doctrine.

Knight's standing argument, if judicially embraced, would radically expand standing to challenge state and local regulatory actions. A person with senior water rights would have standing to challenge land use approvals of any proposed development that would utilize water from the same aquifer or watershed that conceivably could reduce available water. A person with water rights could challenge regulatory approvals of any water-using development or activities many miles away, given the extensive reach of many watersheds and aquifers, even though injury to such senior water rights would be extremely unlikely and speculative. In effect, Knight is asking this court to adopt an unprecedented expansion of standing far beyond the well-established limitations of Washington State[11] and federal[12] standing doctrine.

3. In Holding that Knight Lacked Standing, the Court of Appeals Did Not Disregard Undisputed Evidence of Knight's Standing.

Knight argues that the Court failed to construe her evidence of standing "in the light most favorable to the nonmoving party." *PFR,* p.10-

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[11] *See, e.g. S.A.V.E. v. City of Bothell,* 89 Wn.2d 862, 576 P.2d 401 (1978).
[12] *See, e.g., Summers v. Earth Island Institute,* 555 U.S.___, 129 S.Ct. 1142, 173 L.Ed.2d 1 (2009).

11. However, as Knight acknowledges *Id.*, the Court stated the correct standard of review on issues raised in motions for summary judgment. *Decision,* p.9. The flaw in Knight's argument is that no matter how favorably her evidence were construed, the legal requirements for standing would not be satisfied.

Knight presented evidence of her senior water rights which are not contested and evidence regarding the City's water usage patterns and water acquisition programs which the City has vigorously contested. But the City's argument and the Court's decision that Knight lacked standing was not based on the resolution of evidentiary issues, but on the law of standing. Granting the most favorable construction of Knight's evidence, it clearly does not establish standing. Knight's argument depends on a logical leap from evidence of her water rights and evidence of water consumption to the conclusion that numerous legal requirements will be ignored and her senior water rights will be impaired by junior water rights. Her argument implicitly assumes that legally required water availability determinations at final plat approval and again at building permit issuance will be erroneously made, that such errors will not be corrected through LUPA appeals, that Ecology will transfer water rights to the City without protecting senior water rights, and that Ecology will not take enforcement action against infringing water users. Knight presented no evidence, no

matter how favorably construed, that this extremely unlikely series of events will occur. Thus, the Court properly concluded that she had not shown she would suffer immediate, concrete, specific injuries to her senior water rights.

4. In Holding that Knight Lacked Standing, the Court of Appeals Did Not Rely on "Concessions that Knight Won" or "Facts that Arose Only After She Appealed."

Knight apparently argues that the Court's decision that she lacked standing is premised on the Court's clarification of the Condition to change "and/or" to "and also," *PFR, p. 9,* because the uncertainties regarding impairment of her water rights were created by the clarification. The argument is factually and legally unfounded. First, as previously argued, the City agreed to the clarification, rather than wasting resources, arguing about it because it did not matter. The City always has taken the position, as the Hearing Examiner emphasized in his Finding 2, CP 394, that state law requires determinations of water availability prior to both **final** plat approval, RCW 58.17.150, and building permit issuance, RCW 19.27.097. Second, these requirements existed long before Knight filed her City Council and LUPA appeal. Clarification of the Condition's language did not create these requirements. Third, the Court's conclusion that impairment of Knight's senior water rights was too uncertain and conjectural to establish standing was based on other uncertainties, as well,

such as uncertainties that Ecology would fail to take protective and enforcement actions and courts would fail to correct erroneous determinations of water availability. *See Decision*, p. 10-13. There is no basis for the contention that the Court's standing decision depended on facts that arose after she filed her LUPA actions.

B. The Court of Appeals' Unpublished Decision on the Attorney Fees Issue Was Based on the Plain Language of RCW 4.84.370 and Does Not Warrant Review by the Supreme Court.

1. Knight Is Barred From Making Arguments in Her PFR that She Did Not Brief in the Court of Appeals.

In the Court of Appeals, the sole basis for Knight's argument that the City was not entitled to recover attorney fees under RCW 4.84.370 was that the preliminary plat approvals were not "upheld at superior court" under RCW 4.84.370((2). *Resp.Br.*,pp. 55-57. In her PFR, Knight makes two additional arguments: (1) that only parties who appeal beyond superior court are entitled to attorney fees, *PFR*, pp. 16-18; and (2) that attorney fees are not recoverable by a party who prevails on procedural grounds. *PFR*, p. 20. The latter two issues were improperly raised in Knight's PFR. They are not reviewable by this Court because issues not supported by argument and authority in an appellate brief are waived. *Smith v. King*, 106 Wn.2d 443, 451-52, 722 P.2d 796 (1986). Since an issue raised for the first

time in a reply brief may not be considered[13], an issue that was not raised at all in briefing may not be raised for the first time in a motion for reconsideration or PFR. Because these two issues were not briefed at all on appeal, they were not supported by argument and authority and may not be considered for the first time by the Supreme Court.[14]

2. The City Was the "prevailing party or substantially prevailing party" in the Superior Court, under RCW 4.84.370(1)(b), and the City's decision was "upheld at superior court" under RCW 4.84.370(2).

The Court applied the plain language of RCW 4.84.370 in concluding that the City and Tahoma Terra substantially prevailed in superior court because that court "ultimately upheld the City's decisions to grant the preliminary subdivision approvals." *Decision*, p. 14. Knight acknowledges that the superior court "upheld the decision to approve the preliminary subdivisions." *PFR.* At 18. However, Knight nevertheless argues that because the lower court remanded for a minor inconsequential modification of language in a condition, superfluous findings and conclusions, and procedural rulings that had no affect on the validity of the preliminary plat approvals, the City was not upheld at the superior court.

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[13] *Cowiche Canyon Conservancy v. Bosley,* 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

[14] *See American Legion Post No.32 v. City of Walla Walla,* 116 Wn.2d 1, 7, 802 P.2d 784 (1991). *See also Habitat Watch v. Skagit County,* 155 Wn.2d 397, 416, 120 P.3d 56 (2005).

The minor clarification of the language of the Condition from "and/or" to "and also" was a mere technicality that had no effect on the validity of the challenged preliminary plat approvals. The clarification merely reflected what the hearing examiner explicitly said he meant in Finding 2. CP 394. State law required determinations of available water supply at both final plat approval, RCW 58.17.150, and building permit issuance, RCW 19.27.097, regardless of any such condition. And the parties agreed to the clarification.

The trial court's findings and conclusions had no legal effect and became nullities when appealed. The reason the City appealed, as the City explained in its opening brief, was to make these findings and conclusions nullities. ***See,*** *Br. of App.* City, p. 2. And once appealed, the findings and conclusions automatically became nullities. *E.g., J.L. Storedahl & Sons, Inc. v. Cowlitz County,* 125 Wn.App. 1, 8, 103 P.3d 802 (2004). Given the superfluous, evanescent nature of the findings and conclusions, they do not support the argument that the City did not substantially prevail before the superior court. What was **substantial** was the lower court's denial of Knight's arguments that the city's approvals should be invalidated. The court declined to invalidate the approvals and they remained in effect.

Similarly, the lower court's rulings on standing and other procedural matters did not make Knight the substantially prevailing party.

The City's "land use decisions, " appealable under LUPA, were the City's decisions granting preliminary subdivision approvals. Knight petitioned the superior court to invalidate these land use decisions. The superior court did not invalidate the City's land use decisions. The **substantial** issue before the superior court was the validity of the land use decisions—the preliminary subdivision approvals. Because the decisions were upheld, the City was the "substantially prevailing party" and the City's decisions were "upheld at superior court", under the plain language of RCW 4.48.370(1) and (2).

3. If Knight is Not Barred from Relying on the Argument, RCW 4.84.370 Does Not Apply Only to Parties Who Appeal Beyond Superior Court.

Knight is barred from arguing that only respondents may recover attorney fees by failing to raise this issue in briefing to the Court of Appeals. But even if the argument may be raised, it is without merit. Knight's argument is contradicted by the plain language of the statute and relies solely on *dicta* in two reported decisions.[15] In both cases, the courts awarded attorneys' fees to respondents. In neither case was the court presented with the issue of whether an appellant who satisfies the plain language of the statutory prerequisites is barred from recovery of attorneys'

[15] *Habitat Watch v. Skagit County,* 155 Wn.2d 397, 413, 120 P.3d 56 (2005) and *Gig Harbor Marina v. City of Gig Harbor,* 94 Wn.App.789, 800, 873 P.2d 1081 (1999).

fees. Statements in a case "that do not relate to an issue before the court and are unnecessary to decide the case constitute *obiter dictum,* and need not be followed." *State v. Potter*, 68 Wn. App. 134, 150 n.7, 842 P.2d 481 (1992).

It is not surprising that there are no reported decisions awarding attorney fees to an appellant under RCW 4.84.370. Normally, a party who substantially prevails in superior court has no motivation to appeal. However, this is an unusual case. The superior court decision did not overturn the City's plat approvals. The lower court decision simply required that the wording of Condition be slightly modified to reflect what state law requires anyway and what the Hearing Examiner explicitly acknowledged in accompanying findings. The City agreed with this clarification throughout the superior court proceedings and did not appeal this clarification. Rather, the City appealed, as it clearly explained. *App. City's Br.*, p. 2, because of findings and conclusions advocated by Knight that went far beyond the superior court's decision. Knight pressed the lower court to adopt the superfluous findings and conclusions over the City's objections that the court lacked authority to adopt them and they would become nullities if appealed. Under these circumstances, Knight's own actions essentially forced the City and Tahoma Terra to appeal the superior court's findings and conclusions so that they would become

nullities and could not have any future legal effect. Knight's vigorous advocacy of the findings and conclusions served no constructive purpose, since they would become nullities if appealed and virtually ensured that an appeal would be filed by the City.

Under the unambiguous language of the statute, filing an appeal does not disqualify a party from an award of attorney fees. So it would not be proper to construe the unambiguous language on the basis of underlying legislative intent. However, under the special circumstances of this case, even if the legislative intent were relevant, awarding attorneys' fees would be consistent with the legislative intent of avoiding time-consuming, costly appeals. While the appeals were filed by the City and Tahoma Terra, they were knowingly caused by Knight's persistent pursuit of superfluous findings and conclusions that served no constructive purpose.

Moreover, once the appeals were filed, Knight could have declined to participate in the appeal. However, Knight vigorously participated in the appeal not only contesting the issues raised by appellants, but raising and rearguing issues regarding the validity of the City's preliminary subdivision approvals that were not raised in the appeals and, thus, were, in effect, a cross-appeal by Knight. *See, e.g. Resp.Br., p.*.47-52.

4. If Knight is Not Precluded from Raising the Argument, RCW 4.84.370 Does Not Bar Recovery of Attorney Fees by a Party Who Prevails on a Procedural Basis.

Knight argues that appellants were not prevailing parties in the Court of Appeals because the Court decided in their favor on the basis of Knight's lack of standing rather than "on the merits" of the City's preliminary subdivision approvals. Knight has waived this argument because it was not raised in her Court of Appeals briefing. But even if the argument were not barred, it is contrary to the Supreme Court's decision in *Habitat Watch v. Skagit County,* 155 Wn.2d 397, 120 P.3d 56 (2005) and Division 2 of the Court of Appeals' most recent reported decision on attorneys' fees under RCW 4.84.370 in *Nickum v. City of Bainbridge Island,* 153 Wn.App. 366, 383, 223 P.3d 1172 (2009). In *Habitat Watch,* the Supreme Court awarded attorneys' fees under RCW 4.84.370 to parties who prevailed on procedural grounds. Similarly, in *Nickum,* attorneys' fees were awarded where the City prevailed on a procedural basis—failure to exhaust administrative remedies. The issue was briefed to the Court in *Nickum.*[16] The Court resolved the issue consistently with the Supreme Court's decision in *Habitat Watch.*

VI. CONCLUSION

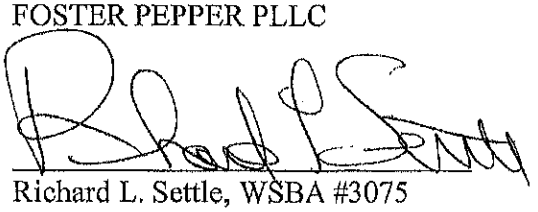
The City submits that this case does not warrant review by the Supreme Court and requests denial of review. If the Petition for Review is

[16] *See Nickum v. City,*2008 WA App. Ct. Briefs 967745, 2009 WA App. Ct. Briefs, LEXIS 65 (Wash.Ct.App). Jan. 23, 2009.

denied, the City also requests that the Court award to the City its attorney fees and costs incurred in answering Knight's Petition for Review.

RESPECTFULLY SUBMITTED this 18th day of August, 2010.

FOSTER PEPPER PLLC



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DECLARATION OF SERVICE

Elizabeth A. Johns certifies and declares that:

I am a citizen of the United States, over the age of 18 years, not a party in the foregoing action, and competent to testify as a witness. I am employed by the law firm of Foster Pepper PLLC, and my business address is 1111 Third Avenue, Suite 3400, Seattle, Washington, 98101.

On August 18th, 2010 I caused true and correct copies of the following documents:

1. Respondent City of Yelm's Answer to Petition for Review; and

2. this Declaration of Service

to be delivered in the manner indicated below to the following:

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I hereby certify and declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed at Seattle, Washington this 18th day of August, 2010.

Elizabeth A. Johns

OFFICE RECEPTIONIST, CLERK

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Rec. 8-18-10

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Transmitted for filing please find respondent City of Yelm's *Answer to Petition for Review* in Supreme Court No. 84831-9 - JZ Knight v. City of Yelm, et al.

I am transmitting this on behalf of the following:

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